Nos. 77-1575, 77-1648 and 77-1662

In the Supreme Court of the United States

OCTOBER TERM, 1978

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS

v.

MIDWEST VIDEO CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

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OPINIONS BELOW

The opinion of the court of appeals (App. 1-92)[1] is reported at 571 F.2d 1025. The orders of the Federal Communications Commission (App. 93-181, 182-206) are reported at 59 F.C.C. 2d 294 and 62 F.C.C. 2d 399.

[1] "App." citations refer to the appendix to the Federal Communications Commission's petition for a writ of certiorari (No. 77-1575). After the petitions were granted, the parties agreed not to file a joint appendix.

JURISDICTION

The court of appeals entered judgment on February 21, 1978. A stay of mandate was granted by order dated April 4, 1978 (App. 207-208). The Commission filed its petition for certiorari on May 4, 1978, within the allotted time, and invoked this Court's jurisdiction pursuant to 28 U.S.C. 1254(1). On May 19 and May 22, 1978, respectively, the American Civil Liberties Union and the National Black Media Coalition, *et al.*, also filed petitions for certiorari, and on July 25, 1978, the United States filed a brief in support of the Commission's petition. This Court granted all the petitions on October 2, 1978, and consolidated the three cases.

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has statutory authority to require certain cable television systems: (1) to have the capacity by 1986 to provide at least 20 channels of service; (2) to provide access to third parties if demand exists and there is sufficient activated channel capacity and (3) to make available certain equipment and facilities to those third parties for access purposes.

2. Whether the foregoing rules are consistent with the First and Fifth Amendments.

STATUTES AND REGULATIONS INVOLVED

Sections 1, 2(a), 3(h), 303(g), 303(r) and 307(b) of the Communications Act of 1934, 47 U.S.C.

151, 152(a), 153(h), 303(g), 303(r) and 307(b) are set forth at App. 209-211. Sections 76.13, 76.252, 76.254, 76.256, 76.258, and 76.305 of the Rules and Regulations of the Federal Communications Commission, 47 C.F.R. 76.13, 76.252, 76.254, 76.256, 76.258, and 76.305, are set forth at App. 168-176, 202-203.

STATEMENT

In May 1976 the Federal Communications Commission issued a *Report and Order in Docket 20508* (App. 93-181) (the "*1976 Order*") promulgating access, equipment availability, and channel capacity rules for cable television systems. The rules, which amended similar rules promulgated in 1972, require cable systems which have 3,500 or more subscribers (about 23% of all systems),[2] and which carry broadcast signals: (1) to have the capacity by 1986 to provide at least 20 channels for cable services; (2) to make available certain channels for third party access (to the extent that demand exists and that those channels are not needed by the operator for his own established broadcast retransmission or pay cable services; and (3) to make certain equipment and facilities available for access purposes.

On review, the United States Court of Appeals for the Eighth Circuit set aside the *1976 Order* on the ground that the rules were beyond the Commission's jurisdiction (App. 1-92). The court also expressed the

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[2] Of the 3911 systems in operation on September 1, 1977, 913 had more than 3,500 subscribers. *TV Factbook*, No. 47, Services Vol. at 73a (1978 ed.).

view that the rules violated the First and Fifth Amendments and were inadequately supported by the record.

On October 2, 1978, this Court granted petitions for a writ of certiorari filed by the Commission and two other parties, and supported by the United States.

A. Background of the 1976 Order.

In the 1960's, the Commission became concerned that the unregulated growth of cable television could have substantial adverse impacts on broadcast television, to the detriment of the public interest.[3] *First*

[3] "Cable television" is sometimes also referred to as "community antenna television" ("CATV"). CATV refers to systems that receive, amplify and retransmit television broadcast signals to the system's subscribers by wire or microwave. "Cable television" is a broader term that includes the broadcast retransmission function of CATV systems as well as the transmission of non-broadcast signals, and was adopted by the Commission in place of *Cable Television Report and Order (Docket 18397 et al.)*, 36 F.C.C. 2d 143, 144 n.9 (1972).

Since the Commission's regulation of cable television began in 1965, the industry has grown tremendously. Currently, there are more than 4,000 cable systems serving 12.9 million subscribers, or the equivalent of 17.6% of the nation's television homes. *Television Digest*, Vol. 18, No. 13, March 27, 1978 (totals as of January 1, 1978). Technological advances have continued to increase the "multichannel capacity" which enables cable systems to add to the number of outlets of communication and to increase the diversity of program and service choices. By September 1, 1977, 465 systems possessed 13 to 20 channel capacity; 501 systems had more than 20 channel capacity. *TV Factbook*, No. 47, Services Vol. at 73a-76a (1978 ed.). Today, systems of up to 80 channels are at least technically feasible, and the advent of laser technology may soon make channel capacity virtually limitless.

Report and Order in Docket 14895 et al., 38 F.C. 683, 713-714 (1965) (the "*1965 Order*"); *Second Report and Order in Docket 14895 et al.*, 2 F.C.C. 2d 725, 728 (1966) (the "*1966 Order*"). It therefore asserted jurisdiction over cable television and adopted rules restricting the signals that could be carried on cable systems.[4] When these "signal carriage" rules were challenged, this Court held that the Commission's statutory jurisdiction to regulate cable is based on Section 2(a) of the Communications Act of 1934, 47 U.S.C. 152(a), and extends at least to regulation that is "reasonably ancillary" to its regulation of the broadcast industry. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).[5]

Shortly after *Southwestern Cable*, the Commission concluded that it was in the public interest and within its statutory authority not only to regulate cable television so as to prevent adverse effects on broadcasting, but also "to requir[e] CATV affirmatively to further statutory policies." *Notice of Proposed Rule-*

[4] The Commission at first sought to regulate cable indirectly by placing restrictions on the activities of common carrier microwave facilities that served CATV systems. Later it began to regulate some systems directly, but only those that were served by microwave. By 1966, however, the Commission had concluded that it had statutory authority to regulate all cable systems directly. *1966 Order*, *supra*, 2 F.C.C. 2d at 728-734.

[5] The Court in *Southwestern Cable* did not rule upon the validity of the signal carriage rules, but, as noted in *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 659 n.17 (1972), those rules were subsequently and correctly upheld by the courts of appeals.

making and Notice of Inquiry in Docket 18397, 15 F.C.C. 2d 417, 422 (1968); see also *First Report and Order in Docket 18397*, 20 F.C.C. 2d 201 (1969) (the "*1969 Order*"). In particular, the Commission "recognize[d] the great potential of the cable technology to further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services." *1969 Order, supra*, 20 F.C.C. 2d at 202. The Commission therefore adopted a rule requiring all cable systems which had 3,500 or more subscribers, and which carried broadcast signals, to operate to a significant extent as outlets for local programs by requiring them to originate (or "cablecast")[6] some programs and to have available facilities for local production and presentation of programs.

This Court upheld the "mandatory origination" rule in *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972) ("*Midwest Video I*"). The Court expressly affirmed the Commission's determination that the concept of "reasonably ancillary" jurisdiction is not limited to the establishment of rules designed to protect broadcasting stations, but " 'extends also to requiring CATV affirmatively to further statutory policies' " (406 U.S. at 664) (plurality opinion),

[6] "Cablecasting" was defined as "programming distributed on a CATV system which has been originated by the CATV operator or by another entity * * *" as distinguished from the broadcast signals retransmitted over the system. *1969 Order, supra*, 20 F.C.C. 2d at 223.

and, in particular, extends to rules designed, as the Commission had stated, to " 'further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services * * *' " (*id.* at 667-668).

By the time of this Court's decision in *Midwest Video I*, the Commission, in a further effort to promote the statutory objectives of increasing outlets and augmenting choices, had adopted access and channel capacity rules. Thus, in 1972, the Commission promulgated rules requiring all cable operators in the top 100 television markets to build their systems with at least 20-channel capacity and to designate four of these channels for public, governmental, educational and leased access respectively. All cable systems commencing operations in the major markets after March 31, 1972, were to comply immediately, while those which had begun operating prior to that date were generally permitted until March 31, 1977, to comply. *Cable Television Report and Order (Docket 18397 et al.)*, 36 F.C.C. 2d 143, 189-198 (1972) (the "*1972 Order*") (reproduced at App. 212-217). That rule, the predecessor of the rules now under review, was upheld in *American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975).

In 1974, the Commission repealed its origination rule, concluding that, for the cable medium, access is a more appropriate, less burdensome and equally effective means of promoting statutory objectives. *Re-*

port and Order in Docket 19988, 49 F.C.C. 2d 1090, 1099-1100, 1104-1106 (1974) (the "*1974 Order*"). However, the Commission retained its equipment availability rule so that facilities would be available to third parties for the production of access programming. See *1974 Order*, *supra*, 49 F.C.C. 2d at 1106-1108.

B. The 1976 Order

As the Commission gained further experience with its access and channel capacity rules, it concluded that economic considerations—particularly those presented by the 1977 compliance deadline—warranted reconsideration of the rules. It therefore instituted two further rulemaking proceedings. The first, Docket 20363, resulted in an order cancelling the March 1977 deadline. *Report and Order in Docket 20363*, 54 F.C.C.2d 207 (1975) (the "*1975 Order*"). The second, Docket 20508, led to an order in which the Commission reaffirmed its access and channel capacity policies, but applied the rules to all systems with 3,500 or more subscribers, whether or not they were located within the major markets, and also relaxed its rules substantially. *1976 Order*, 59 F.C.C.2d 294 (App. 93-181). It is the *1976 Order* which is the subject of this litigation.[7]

Numerous comments were filed in the proceeding, and in its order the Commission responded at the

[7] The Commission's *1975 Order* has also been challenged in *National Black Media Coalition* v. *FCC*, No. 75-1792 (D.C. Cir.), a case held in abeyance pending the outcome of this proceeding.

outset to contentions that the basic concept of the access rules was outside its jurisdiction and was in any event unconstitutional. It concluded that the rules are within its statutory jurisdiction because they are designed to serve the very same objectives as the origination rules held to be within the Commission's jurisdiction in *Midwest Video I—i.e.*, " 'increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services.' " *Midwest Video I*, *supra*, 406 U.S. at 668. App. 103.

The Commission also rejected arguments that access requirements constitute impermissible common carrier regulation, stating that cable systems are "neither broadcasters nor common carriers within the meaning of the Communications Act." Rather, cable is a "hybrid" requiring "identification and regulation as a separate force in communications." App. 104, quoting the *1972 Order*, *supra*, 36 F.C.C.2d at 211. Therefore, the Commission said, "[s]o long as the rules adopted are reasonably related to achieving objectives for which the Commission has been assigned jurisdiction we do not think they can be held beyond our authority merely by denominating them as somehow 'common carrier' in nature. The proper question, we believe, is not whether [the rules] fall in one category or another of regulation * * * but whether [they] promote statutory objectives. We think they do." App. 104.

The Commission also concluded that its rules are consistent with the First Amendment. It stated that

in cablecasting as in broadcasting, "First Amendment values are furthered by 'an uninhibited marketplace of ideas' in lieu of 'monopolization of that market' by the government or a private broadcaster or cable owner." App. 105, quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969).[8]

The rules promulgated by the 1976 Order operate generally as follows:

1. *Channel Capacity Rules.* The channel capacity rules require cable systems with 3,500 or more subscribers[9] to have the technical capacity to provide a minimum of 20 channels "available for immediate or potential use for the totality of cable services to be offered." 47 C.F.R. 76.252; App. 168. The rules permit most existing systems until 1986 to comply with this requirement in order to permit most additional capacity to be installed in the course of normal construction and replacement. App. 146-161, 168-169. The rules do not require cable operators to install converters enabling the reception of 20 channels by subscribers. Without such equipment, most subscribers now can receive only 12 channels on their

[8] The Commission also observed that although the cable access rules were not before it, this Court in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973), discussed the possibility of a "limited right of access that is both practicable and desirable" and referred specifically to the cable access rules. App. 105 n.4; see 412 U.S. at 131.

[9] The 3,500-subscriber standard amended the "top 100 market" standard employed in the *1972 Order*. App. 105-106, 111-120.

television sets. App. 132-138.[10] The rules also require cable systems to develop a capacity for two-way non-voice communications. App. 124-130.

2. *Access Rules.* The access rules provide that, as of June 21, 1976, a cable system must allow four groups (the public, educational authorities, local governments and paying lessors) to use available channels of the system that the cable operator is not using for broadcast retransmission or pay programming services (47 C.F.R. 76.254; App. 139-143, 169-171). The rules do not require the system to displace those services in favor of providing access.[11]

[10] A converter is a relatively expensive (*i.e.*, $25-40 per unit) piece of equipment which, when installed on a cable subscriber's television set, allows him to receive more than 12 channels of cable programming—something which is otherwise impossible in most cases. See App. 132 n.11. Although the cable operator is not required to install converters, if a third party wishes to bear the expense of installing them in order to make a channel or channels available for access, then the cable operator must permit the installation. App. 136-139.

[11] Thus the rules provide that the system shall provide access "to the extent of its available activated channel capability". 47 C.F.R. 76.254; App. 169. In the *1976 Order* the Commission explained that "available activated channel capability" is determined by starting with "the number of usable channels actually provided to each subscriber's home," and subtracting "channels already programmed by the system operator for which a separate charge is made" and "channels used to provide traditional cable television service, *i.e.*, channels providing television broadcast signals * * *." App. 141-142. The Commission further stated (App.

The rules also provide that the system operator may combine all access services on one composite channel if the demand for such services can be satisfied in this manner. App. 140-141, 170. Systems in operation on June 21, 1976, that did not at that time have even one full channel available for access are permitted to provide access on "whatever portions of channels are available for such purposes."[12] 47 C.F.R. 76.254(c); App. 171. Existing systems that did have an unoccupied channel on June 21, 1976, and systems commencing operation after that date are required to "maintain at least one full channel for shared access programing" (*ibid.*).[13]

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143 n.19): "It is not our intention that established cablecast services provided by system operators be automatically displaced."

[12] Those portions would include "blackout time", which occurs as a result of the Commission's network non-duplication rule, whereby a broadcast station is entitled to demand that its network programming not be carried on a cable channel in the same service area. See 47 C.F.R. 76.92. See also App. 140 & nn. 17, 18.

[13] A number of questions concerning the administration of the access rules and the resolution of potential conflicts among competing channel uses are not clearly resolved by the *1976 Order*. The *1976 Order* acknowledged that fact (App. 148):

> [T]he administration of the composite access channel approach will undoubtly present many difficulties. We shall, after some experience with these new rules has been gathered, issue a primer on various matters respecting our access channel obligations by which we hope to further clarify our position on these matters. We shall also administer our approach in a flexible manner and shall not hesitate to revisit this entire area should our experience dictate that our public interest goals are not being met.

3. *Equipment Availability Rule.* The equipment availability rule provides that each system of 3,500 or more subscribers "shall have available equipment for local production and presentation of cablecast programs other than automated services and [shall] permit its use for the production and presentation of public access programs." 47 C.F.R. 76.256(a); App. 172. The rule also provides that, for programs exceeding five minutes in length, the system operator can impose reasonable charges for "equipment, personnel, and production of public access programming." 47 C.F.R. 76.256(c)(3); App. 173.

C. The Court of Appeals Decision

On review, the court of appeals set aside the channel capacity, access and equipment availability rules as being beyond the Commission's statutory jurisdiction (App. 1-92). The court asserted a number

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And in its order on reconsideration (App. 182-206) the Commission again emphasized the point (*id.* at 198):

> We have not included, beyond the specifications contained in Section 76.256 of the Rules, every detail of what these rules should contain, leaving cable operators some leeway to experiment with the details of the rules and to accommodate them, in a reasonable fashion, to local conditions. Questions as to the reasonableness of particular sets of rules should be referred to the Commission for resolution. Every effort will be made to resolve these questions on an informal basis, but more formal proceedings will be commenced if necessary.

of reasons in support of that conclusion. First, it stated that the Communications Act provides no "express basis for jurisdiction" over cable television (App. 24). It reasoned that the rules were not "reasonably ancillary" to the Commission's broadcast jurisdiction under the principles of *Southwestern Cable* and *Midwest Video I*, because the purpose of the access rule was neither to protect broadcasters nor "to require that cable systems do what broadcasters do * * *" (App. 28). In addition, the court concluded that the objectives of the rules, to increase outlets and programming choices, were essentially irrelevant to the jurisdictional issue (App. 32-50), and that the Commission's "ends" do not justify its "means."[14] App. 50-53. Finally, it concluded that the access rules contravened express jurisdictional limitations, because, in the court's view, the Commission could not impose access rules on broadcasters (App. 54-59) and because broadcasters cannot be regulated as common carriers under Section 3(h) of the Act, 47 U.S.C. 153(h) (App. 59, 64).

Having held the rules to have been beyond the Commission's jurisdiction, the court of appeals expressed at some length its view that the rules in any event would violate the First and Fifth Amendments (App.

[14] The court also stated that the Commission could not base its rules upon "futuristic visions" (App. 44), but must actually find evidence of "substantial national demand" for access services (App. 48). But even this would not confer jurisdiction (*id.* at n.54). Finally, the court expressed doubt that the rules were in the public interest (App. 49-50).

64-82), although the court expressly declined to rest its decision on constitutional grounds (*id.* at 64). The court concluded that the rules would deprive cable operators of control of communications transmitted on their facilities in violation of the First Amendment principles set forth in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) (App. 71-74).[15] The court also "suggested" (*id.* at 77, 78-79) that the rules would constitute a taking of property for public use without compensation in violation of the Fifth Amendment.[16]

SUMMARY OF ARGUMENT

I

The Commission has statutory authority to promulgate the channel capacity, access and equipment availability rules under Section 2(a) of the Communications Act and principles established in *Southwestern Cable* and *Midwest Video I*. *Southwestern Cable* held that the Commission's jurisdiction to regu-

[15] The court also concluded that the rules would impose upon cable operators impermissible censorship obligations with respect to indecent or obscene materials (*id.* at 75-77). The Commission did not seek review of that conclusion since the Commission has instituted a review of those provisions dealing with obscene and indecent materials (77-1575 Pet. 15-16 n.15).

[16] The court, also without deciding, raised a number of questions about the adequacy of the Commission's rationale and the record support for its rules, and stated (App. 91) that "it is at best doubtful that a court could avoid finding [the record] reflective of agency action arbitrary and capricious."

late cable television is based on Section 2(a) and includes at least the authority to prescribe rules that are "reasonably ancillary" to the Commission's regulation of television broadcasting. *Midwest Video I* upheld the Commission's rules requiring cable systems to originate programs, and explained that the reasonably ancillary standard is not limited to the promulgation of rules designed to protect or directly affect television broadcasting; it also extends to rules, like the origination rule, designed to require cable systems themselves affirmatively to promote such statutory policies as increased outlets for community expression and programming choices for the public.

The rules under review are reasonably ancillary to the Commission's regulation of broadcasting in the very same sense as the origination rule upheld in *Midwest Video I*. Like the origination rule, they are designed to promote the statutory objectives of increased community outlets and programming choices; indeed they were adopted in large part as a less burdensome substitute for the now-repealed origination rule. They would also appear to fall more clearly within the jurisdiction recognized by all of the members of the Court in *Midwest Video I*, because the principal objection of the dissenters in that case to the origination rule was that it required cable systems, which are for the most part simply carriers of the signals of others, affirmatively to engage in an enterprise they had not chosen to undertake. The rules under review here, in contrast, impose a limited

form of carriage obligation that is similar to cable television's principal function.

II

The rules under review do not contravene the First Amendment rights of cable operators.

1. Although the court below did not separately analyze the different types of rules promulgated by the *1976 Order*, the channel capacity rules, requiring certain cable systems by 1986 to have the potential of transmitting 20 channels, do not deprive the cable operators of control over what is transmitted on his facilities. Those rules present no substantial constitutional question even under the court of appeals' analysis.

2. With respect to the access rules, the court of appeals erred in concluding that they violate the First Amendment by simple analogy to the question whether similar rules would be invalid as applied to newspapers, and by relying on *Miami Herald Publishing Co.* v. *Tornillo*, *supra*. A more particularized consideration of the characteristics of the rules and of the cable television industry supports their constitutionality.

First, the access rules impose a very limited obligation on cable operators that does not substantially impair their ability to use their facilities for their principal and traditional functions of broadcast retransmission and pay programming. Rather they impose a limited carriage-type obligation to provide access on channels that the operator is not using for

those services. Unlike the right of reply statute held invalid in *Miami Herald*, the obligation is content-neutral; it is not triggered by anything communicated over the system's facilities and therefore does not have the capacity to chill the operator's exercise of its own First Amendment rights.

Second, the access rules are designed to enhance what this Court has frequently held to be significant First Amendment interests, namely the "widest possible dissemination of information from diverse and antagonistic sources" (*Associated Press* v. *United States*, 326 U.S. 1, 20 (1945)) and "an uninhibited marketplace of ideas" (*Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969)).

Third, although it may be that such a limited common carriage obligation could not constitutionally be imposed on newspapers or other print media, there are significant differences between cable television and the print media and also significant similarities between cable television and communications common carriers and broadcasters upon whom similar obligations may be imposed. The particular characteristics of cable television make analogies to the print media inappropriate and support the constitutionality of the access rules.

Finally, the validity of the access rules is strongly supported by *Midwest Video I*, which noted with approval that the courts of appeals had upheld the Commission's earlier signal carriage rules, which, *inter alia*, also imposed a limited carriage obligation on cable systems; *i.e.*, the obligation to carry the signals of local broadcast licensees. For First Amendment purposes, the access rules here are not materially different from those signal carriage rules.

III

The court of appeals erred in suggesting that the rules under review constituted a taking of property in violation of the Fifth Amendment. Under principles recently reaffirmed in *Penn Central Transportation Co.* v. *New York City*, No. 77-444 (June 26, 1978), the relatively limited obligations imposed by these rules fall far short of a taking.

ARGUMENT

I

THE COMMISSION HAS STATUTORY AUTHORITY TO ADOPT ACCESS, EQUIPMENT AVAILABILITY AND CHANNEL CAPACITY RULES FOR CABLE TELEVISION SYSTEMS WHICH CARRY BROADCAST SIGNALS

The holding of the court of appeals that the Commission lacks statutory jurisdiction to promulgate the rules under review is contrary to this Court's decisions in *Southwestern Cable* and *Midwest Video I*. Those decisions established that the Commission's basic grant of jurisdiction over cable television is Section 2(a) of the Communications Act; that its authority to prescribe rules for cable television includes rules that are " 'reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting' " (392 U.S. at 178; 406 U.S. at 670); and

that such "reasonably ancillary" rules include not only rules designed to protect or affect the business of broadcast licensees but also those designed to require cable systems themselves affirmatively to promote such statutory policies as increased community outlets and programming choices. Those principles fully support the Commission's jurisdiction in this case.

A. Section 2(a) of the Communications Act Establishes the Commission's Jurisdiction Over Cable Television

Section 2(a) of the Communications Act, 47 U.S.C. 152(a), provides in pertinent part:

> The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio * * *.

In *Southwestern Cable* this Court held that Section 2(a) constitutes the Comission's basic grant of jurisdiction over cable television, which is undisputably "interstate * * * communication by wire or radio * * *." 392 U.S. at 168-169. See also *Midwest Video I*, *supra*, 406 U.S. at 662 and n.21. In so holding, the Court expressly rejected the contention, which the court below accepted (App. 22-24),[17] that neither

[17] With respect to the Commission's reliance on Section 2(a), the court of appeals stated only "Section 2 states those to whom the statute applies" (App. 22 n.25).

Section 2(a) nor any other section of the Act expressly conferred jurisdiction over cable television. The cable operators in *Southwestern Cable* had contended that because they were neither common carriers, subject to regulation under Title II of the Act, nor broadcasters, subject to Title III, their activities "elude[d] altogether the Act's grasp." 392 U.S. at 172. The Court, however, held to the contrary (*id.* at 172-173; footnotes omitted):

> We cannot construe the Act so restrictively. Nothing in the language of § 152(a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions. The section itself states merely that the "provisions of [the Act] shall apply to all interstate and foreign communication by wire or radio * * *." Similarly, the legislative history indicates that the Commission was given "regulatory power over all forms of electrical communication * * *." S. Rep. No. 781, 73d Cong., 2d Sess., 1. Certainly Congress could not in 1934 have forseen the development of community antenna television systems, but it seems to us that it was precisely because Congress wished "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission," *F.C.C.* v. *Pottsville Broadcasting Co.*, [309 U.S. 134, 138 (1940)], that it conferred upon the Commission a "unified jurisdiction" and "broad authority." Thus, "[u]nderlying the whole [Communications Act] is recog-

nition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." *F.C.C.* v. *Pottsville Broadcasting Co., supra,* at 138. Congress in 1934 acted in a field that was demonstrably "both new and dynamic," and it therefore gave the Commission "a comprehensive mandate," with "not niggardly but expansive powers." *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 219 [1943]. We have found no reason to believe that § 152 does not, as its terms suggest, confer regulatory authority over "all interstate * * * communication by wire or radio."

See also *Midwest Video I, supra,* 406 U.S. at 660-661.

In both *Southwestern Cable* and *Midwest Video I,* however, the Court found it unnecessary to delineate the outer limits of the Commission's "comprehensive mandate" to regulate interstate communications by wire or radio, including those by cable systems, because it concluded that the Commission's jurisdiction at least included prescribing rules for cable television that are " 'reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting' " (392 U.S. at 178; 406 U.S. at 670).[18] In the present case

[18] In *Southwestern Cable* and *Midwest Video I,* the Court made clear that it was not holding that the Commission's jurisdiction was *limited* to prescribing rules reasonably ancillary to its responsibilities over television broadcasting; it

it is similarly unnecessary to decide the outer limits of the Commission's jurisdiction over cable because here, too, the rules are reasonably ancillary to the Commission's responsibilities over television broadcasting, as that concept was explained and applied in *Southwestern Cable,* and, particularly, in *Midwest Video I.* Indeed, they are ancillary in the very same sense as the rules upheld in *Midwest Video I.*

simply did not decide that issue. See *Southwestern Cable, supra,* 392 U.S. at 178: "We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes." See also *Midwest Video I, supra,* 406 U.S. at 662.

The Court's articulation of a reasonably ancillary standard appears to have been in response to possible concerns that the Commission's authority to prescribe rules for cable systems would not be confined by any statutory standards if it were based solely on the broad jurisdictional grant of Section 2(a), because the substantive provisions of the Act (Titles II and III) related specifically to common carriers and broadcasters respectively, and cable systems could not be precisely described as either. As the Court stated in *Midwest Video I, supra,* 406 U.S. at 661, "§ 2(a) does not in and of itself prescribe any objectives for which the Commission's regulatory power over CATV might properly be exercised." There is no basis for such concerns if cable rules can be measured by, and viewed as reasonably ancillary to, the statutory standards and policies governing television broadcasting, to which cable television is closely related. Although those statutory standards antedated both television broadcasting and cablecasting, they embody policies that are pertinent to both.

B. The Rules Under Review Are Reasonably Ancillary to the Commission's Responsibilities For the Regulation of Broadcast Television

In *Southwestern Cable*, the Court upheld the Commission's authority to prescribe rules for cable that are reasonably ancillary to the Commission's jurisdiction over television broadcasting in the context of rules designed to protect broadcasters by restricting the broadcast signals that cable systems retransmit to their subscribers.[19] In *Midwest Video I*, the Court applied the same principles to uphold rules requiring certain cable systems to perform more than their traditional function of receiving and retransmitting the signals of broadcasters—requiring them, *inter alia*, to originate programming produced by themselves or others. Although the origination requirement was not designed to protect television broadcasters, or even to affect them directly, the plurality opinion of the Court affirmed the Commission's view that its "reasonably ancillary" jurisdiction over cable television "is not limited to controlling the competitive impact CATV may have on broadcast services. * * * [W]e must agree with the Commission that its 'concern with CATV carriage of broadcast signals is not

[19] Those rules required cable systems to carry local broadcast signals, prohibited duplication of local broadcast programming, and prohibited importation of distant signals into certain markets. The Court did not pass on the validity of those rules, but as was noted in *Midwest Video I, supra*, 406 U.S. at 659, n.17, "[t]heir validity was, however, subsequently and correctly upheld by courts of appeals as within the guidelines of [*Southwestern Cable*]. See, *e.g., Black Hills Video Corp.* v. *FCC*, 399 F.2d 65 (CA 8 1968)."

just a matter of avoidance of adverse effects, but extends also to requiring CATV affirmatively to further statutory policies' [15 F.C.C. 2d 417, 422 (1968)]." 406 U.S. at 664. That opinion further stated (406 U.S. at 667-668):

> [T]he critical question in this case is whether the Commission has reasonably determined that its origination rule will "further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services * * *." [Quoting from 20 F.C.C. 2d 201, 202 (1969).] We find that it has.

The Court also rejected contentions that the Commission could not require cable systems to provide services that they had not willingly undertaken to perform. The plurality opinion stated (406 U.S. at 670):

> The Commission is not attempting to compel wire service where there has been no commitment to undertake it. CATV operators to whom the cablecasting rule applies have voluntarily engaged themselves in providing that service, and the Commission seeks only to ensure that it satisfactorily meets community needs within the context of their undertaking.

It is also significant here that *Midwest Video I* further noted that the courts of appeals had correctly applied the reasonably ancillary standard established in *Southwestern Cable* to uphold the Commission's earlier "signal carriage rules," which, *inter alia*, re-

quire cable systems to carry the signals of local broadcasters located within the system's service area upon the broadcasters' request. 406 U.S. at 659 n.17.[20]

The principles stated in *Midwest Video I* control the jurisdictional issue in this case. The channel capacity, access, and equipment availability rules are designed to serve the very same objectives of increasing community outlets of expression and increasing programming choices as the origination rules upheld in *Midwest Video I*, and the Commission's judgment that they will promote those objectives is a reasonable one.[20a] Indeed, as the *1972 Order* and *1976 Order* reflect, the rules at issue here were designed in large part as a substitute for the origination rule (which was repealed in 1974) that would be less burden-

[20] The Chief Justice concurred in the result in *Midwest Video I*. While he expressed the view that the Commission's imposition of an origination requirement "strain[ed] the outer limits" of its jurisdiction, the Chief Justice also acknowledged that "Congress has created its instrumentality to regulate broadcasting [and] has given it pervasive powers." 406 U.S. at 676. In addition, the Chief Justice "agree[d] with the plurality's rejection of any meaningful analogy between requiring CATV operators to develop programing and the concept of commandeering someone to engage in broadcasting. * * * [W]hen [cable operators] interrupt the [broadcast] signal and put it to their own use for profit, they take on burdens, one of which is regulation by the Commission." *Ibid.*

[20a] As *Midwest Video I* noted (406 U.S. at 669-670), those policies and objectives are set forth in a number of provisions of the Communications Act, including Sections 1, 303(g) and 307(b), 47 U.S.C. 151, 303(g) and 307(b).

some on cable operators than the origination rules and yet would serve largely the same objective (App. 103-104; *1974 Order*, *supra*, 49 F.C.C. 2d at 1099-1100).[21]

Moreover, to the extent that they differ, the rules here fall more clearly within the jurisdiction recognized by all Members of the Court in *Midwest Video I*. The principal objection of the four dissenting Justices in that case was to the fact that the origination rule imposed on cable operators functions and responsibilities that were different from those they had chosen to undertake. 406 U.S. at 677-681. The dissenting opinion emphasized that "CATV is simply a carrier having no more control over the message content that does a telephone company" (*id.* at 680), and concluded that requiring such carriers to engage in program origination was so extreme a step that it should be left to Congress. The rules here, in contrast, impose carriage requirements that are far closer to cable television's traditional retransmission functions than is program origination. See also *American Civil Liberties Union* v. *FCC*, 523 F.2d 1344, 1351

[21] Furthermore, it is significant that *Midwest Video I* upheld not only the rule requiring cable systems to originate programming but also the related rule requiring them to make available facilities for local production and presentation of programs. 406 U.S. at 653-654. Although the court below did not separately analyze the different rules here under review for either jurisdictional or constitutional purposes (see also discussion, page 35, *infra*), the equipment availability rules not only serve the same objectives as the rules upheld in *Midwest Video I*, but also constitute the same means employed for that purpose as that utilized in the rules upheld in that case.

(9th Cir. 1975), upholding the access rules promulgated by the *1972 Order*.

The grounds asserted by the court below for reaching a contrary result conflict squarely with *Midwest Video I*. The court below held that the Commission's objectives were essentially irrelevant to the jurisdictional issue, but *Midwest Video I* established quite the contrary.[22] The court relied on the fact that the rules do not protect broadcasters, and have no "nexus" with the services provided by broadcasters (App. 28); but the origination rules were not designed to protect broadcasters, and had no closer "nexus" to services provided by broadcasters than the rules at issue here.[23]

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[22] The court below purported to distinguish *Midwest Video I*'s elucidation of the Commission's jurisdiction in terms of statutory objectives by stating that that discussion only "applied to origination," and not to access rules (App. 35). But this Court's discussion of the general principles governing the Commission's jurisdiction was plainly not limited to the particular rules at issue in *Midwest Video I*.

[23] Rather, both sets of rules were designed to require cable systems themselves " 'affirmatively to further statutory policies' " (406 U.S. at 664). Moreover, the explanation in *Midwest Video I* of the nexus between the origination rules and television broadcasting applies with equal force to the rules presently under review. It was there stated (406 U.S. at 670 n.29):

> Respondent asserts that "it is difficult to see how a mandatory [origination] requirement * * * can be said to aid the Commission in preserving the availability of broadcast stations to the several states and communities." * * * Respondent ignores that the provision of additional programming outlets by CATV necessarily affects the fairness, efficiency, and equity of the distribution of television services. We have no basis, it may be added, for

Noting, moreover, that the Commission has not imposed similar access rules on broadcasters, the court of appeals asserted that the Commission could not do so. Whether or not that assertion is correct,[24] *Midwest Video I* and *Southwestern Cable* indicated that it is beside the point. The relevant inquiry for purposes of the Commission's jurisdiction to promulgate

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> overturning the Commission's judgment that the effect in this regard will be favorable.

[24] Clearly the Commission may impose—and has imposed—on broadcasters rules analogous to the channel capacity and equipment availability rules in this case. Certainly, for example, the Commission can prescribe the transmitting power of broadcast licensees and the equipment that licensees must maintain. See 47 U.S.C. 303(c) and (e).

Whether the Commission could impose an access obligation on broadcasters analogous to the access rules at issue here is an open question. (And in view of the very different physical capabilities of broadcasters and cable systems, see note 26, *infra*, it would be difficult to compare the reasonableness of access obligations imposed on the respective systems.) In *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973), the Court rejected the contention that the First Amendment required the Commission to require broadcasters to accept paid political announcements; but it also stated (412 U.S. at 131) that "[c]onceivably at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable." As an example, the Court specifically noted the Commission's proposed access rules for cable television, which are under review in this case. *Ibid.* Furthermore, in several respects, the Commission and Congress have imposed certain access obligations on broadcasters; examples are the personal attack rule upheld in *Red Lion Broadcasting Co.* v. *FCC*, *supra*, and 47 U.S.C. (Supp. V) 312(a)(7), requiring broadcasters to provide time for candidates for federal office.

rules governing cable television is not whether the Commission has, or even could have, promulgated the identical rules for television broadcasting;[25] rather, as *Midwest Video I* stated, the relevant inquiry is whether the rules "further statutory policies" of increasing community outlets and program choices (406 U.S. at 667-668). And while cable rules (like any other) that are within the Commission's power to adopt may be set aside by a court if they are "not rational and based on consideration of the relevant factors" (*FCC* v. *National Citizens Committee for Broadcasting*, No. 76-1471 (June 12, 1978), slip op. 26), the reasonableness of the means chosen to further those statutory policies clearly depends on the particular characteristics of the communications medium to which they are applied.[26]

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[25] For example, the Commission has not imposed on television broadcasters the signal carriage rules considered in *Southwestern Cable*, for the obvious reason that broadcasting does not perform any function to which they could reasonably be applied. There is no reason to assume that Congress intended the Commission to exercise its powers over the different forms of communications media in identical ways.

[26] The principal difference between television broadcasters and cable systems that is pertinent to the rules involved here concern the physical constraints on the respective systems. The broadcaster's basic constraint, of course, is that he has only one channel on which he can broadcast no more than twenty-four hours in a day. Any access obligation imposed on a broadcaster that would meaningfully increase outlets for community expression and programming alternatives would be likely to displace a significant portion of his own programming time. A cable operator is not similarly constrained. Technology makes it reasonably feasible for each system to have twenty simultaneously transmitting channels, and possibly many more.

Finally, the court below expressed the view that the rules were unwise, not in the public interest, and not supported by record evidence showing a demand for access services.[27] But the wisdom of particular rules and whether they will serve the public interest are matters for the Commission to decide; a reviewing court is limited to determining whether they are within its statutory jurisdiction to adopt and whether they are arbitrary or capricious. See *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, slip op. 28. See also *Midwest Video I*, *supra*, 406 U.S. at 674: "It was, of course, beyond the competence of the Court of Appeals itself to assess the relative risks and benefits of cablecasting."[28] While there was, in our view, substantial evidentiary support in the rulemaking proceeding for the rules the Commission adopted,[29] the court's error was the fundamental one

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[27] Thus the court, incorrectly, described the rules here as a "major foray" designed to "get everybody on television" (App. 33), and stated that they were based on "futuristic visions" (App. 44), that they were not supported by evidence of "substantial national demand" for access (App. 48), and that they would "mandat[e] massive rebuilding * * * in total disregard of what the paying audience wants" (App. 46). See generally App. 42-53.

[28] See also, *e.g.*, *Citizens To Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 413-416 (1971).

[29] The court's conclusion that the record failed to indicate significant demand for access channels is simply incorrect. For example, the city and county schools in San Diego, California, commented in the rulemaking that they had committed and were using a considerable budget for educational access via cable systems to the public schools. App. 151-152. And the

of applying a substantial evidence test to the notice and comment rulemaking employed by the Commission here. In *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, among other cases, this Court has made clear that in rulemaking of this kind (slip op. 36):

> complete factual support in the record for the Commission's judgment or prediction is not possible or required: "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency," *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961) * * *.

See also *Midwest Video I*, *supra*, 406 U.S. at 673-675 & n.31.

Finally, the court of appeals' jurisdictional holding is not only inconsistent, as we have shown, with *Southwestern Cable* and *Midwest Video I*. It is also

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National Cable Television Association, although contending that access rules serve little purpose, gave the results of a survey of major market cable systems. Of 145 systems reported, 36 systems indicated regular daily or weekly use of educational, municipal and public access channels on the average of 18 hours weekly per system and 14 hours weekly per channel. NCTA Comments, filed in Docket 20508, October 3, 1975, at 26-29. This compares favorably to the average of 17 hours per week devoted to news and public affairs by commercial television stations. See F.C.C. News Release, "Television Broadcast Programming Data, 1976", Mimeo #86035, June 30, 1976.

contrary to the basic scheme and policies of the Communications Act. We see no sound reason for concluding that Congress, in its "comprehensive mandate" to the Commission in Sections 1 and 2(a) of the Act, intended to withhold from the Commission the very power, under all circumstances, to promulgate rules of this kind in furtherance of the well established statutory policies of promoting television services, outlets for community expression, and program choices for the public. To the contrary, the potential and growth of the cable television industry (see note 3, *supra*)[30] underscore Congress' "recognition [in the Communications Act] of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).[31]

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[30] As was said of cable television in *Midwest Video I*, *supra*, 406 U.S. at 651, "[t]he potential of the new industry to augment communication services now available is * * * phenomenal."

[31] Indeed, since *Midwest Video I*, Congress has acted in several ways to confirm this Court's conclusion that the Commission's regulation of cable television is congressionally authorized. In the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, 7, enacted in 1972, Congress amended Section 315 of the Communications Act, 47 U.S.C. 315, which imposes equal time and fairness obligations on broadcasting stations, to provide in Section 315(c) that:

> (c) For purposes of this section—

II

THE ACCESS, CHANNEL CAPACITY AND EQUIPMENT AVAILABILITY RULES DO NOT VIOLATE THE RIGHTS OF CABLE OPERATORS UNDER THE FIRST AMENDMENT

The court of appeals, although purporting not to rest its decision on constitutional grounds, expressed at some length its view that the rules under review violate the First Amendment rights of cable operators because they deprive the operators of control of what is communicated on their facilities. The court relied particularly on *Miami Herald Publishing Co.* v. *Tornillo*, *supra*, which held that government

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(1) the term "broadcasting station" includes a community antenna television system; and

(2) the terms "licensee" and "station licensee" when used with respect to a community antenna television system mean the operator of such system.

Similarly, the statutory prohibition on cigarette advertising is applicable not only to broadcasters, but to "any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission." 15 U.S.C. 1335. Most recently, in Pub. L. No. 95-234, 92 Stat. 33, Congress amended 47 U.S.C. 503(b) to provide for forfeiture penalties for persons who willfully fail to comply with the terms and conditions of any "license, permit, certificate, or other instrument or authorization issued by the Commission"; the amendment expressly applies the penalty provisions to common carriers, broadcast licensees and "cable television operator[s]." These actions confirm Congress' understanding that the Commission is to regulate cable television systems, and certainly do not reflect any congressional objection to the principle of imposing access, equipment availability and channel capacity requirements on such systems.

cannot, under the First Amendment, compel a newspaper to publish the reply of a person whom the newspaper had attacked, even if the newspaper has monopoly economic power. Because the opinion below makes clear the court of appeals' view that the rules, even if within the Commission's statutory jurisdiction, are unconstitutional, this Court, if it agrees with our contention in point I that the rules are within the Commission's jurisdiction, should decide the constitutional questions.

A. The Channel Capacity Rules Do Not Violate The First Amendment Even Under the Court of Appeals' Analysis

The court of appeals' constitutional discussion did not distinguish between the channel capacity rules, the access rules or the equipment availability rules; it broadly condemned them all. But the different rules involve significantly different considerations for purpose of constitutional analysis, and we submit, as a preliminary matter, that there is no basis, even under the court of appeals' analysis, for invalidating the channel capacity rules under the First Amendment.

While the channel capacity rules were adopted in part to provide the capacity to meet access obligations, they also serve significant independent interests in the efficient and orderly development of what this Court in *Southwestern Cable* and *Midwest Video I* (and even the court below, see App. 64-65) recognized to be a "dynamic industry". Such rules are

analogous to requirements that broadcast licensees have certain minimum power capacity (see, *e.g.*, 47 U.S.C. 303(c) and (e)) or that those granted building permits provide certain minimum parking or other facilities even though present demand does not require the full use of such capacities. Such rules do not impose the burden that the court below found constitutionally offensive—*i.e.*, divesting the operator of control of what is communicated over his facilities—and there is no basis for concluding that they offend the First Amendment.[32]

B. The Access Rules Do Not Contravene The First Amendment

The court of appeals erred in concluding that the access rules violate the First Amendment, on the basis of a simple analogy to the question whether similar rules would be invalid as applied to newspapers. Determining whether the rules are consistent with the First Amendment requires a more particularized consideration of, first, the characteristics of the rules and the interests they affect, and, second, the characteristics of the industry or entities to which the rules apply. We submit that those considerations support the constitutionality of the access rules under review.

[32] The equipment availability rules, although in themselves the same kind of physical capacity requirements as the channel capacity rules, are more closely tied to the access rules, since they require the availability of equipment for access purposes. We will assume that the equipment availability rules are part of the access rules for purposes of constitutional analysis, and will not separately discuss them.

1. *The Access Rules Impose a Limited and Content-Neutral Form of Carriage Obligation In Furtherance of First Amendment Values*

The court of appeals failed to recognize the limited nature of the access rules. Contrary to its opinion, the access rules do not compel "unlimited access to cable television" (App. 66) and do not, under any circumstances "effectively silence the cable operator, denying him all use of his own facilities, for *any* exercise of his First Amendment rights" (App. 70; original emphasis). Rather, as noted in the Statement (page 11, *supra*), the rules only require cable systems with 3,500 or more subscribers to provide certain channels for access by the public, educational groups, local governments, and lessors to the extent that the system has "activated channel capacity" available for such access; and the *1976 Order* has defined "available activated channel capacity" as channels that the system is not using for its own broadcast retransmission or pay cable services. In addition, the rules permit the cable operator to combine different access uses on the same channel if demand permits even if other channels are available and activated (*i.e.*, unused by the operator). In sum, the rules do not impair the cable operator's ability to provide its principal and traditional services.[33]

[33] We can envision only two potential conflicts of any consequence between the cable operator's needs and the demands of

The rules do require that cable operators permit access users, on a first-come non-discriminatory basis,

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access users that the rules might require to be resolved in favor of access users.

As the Commission explained in the *1976 Order*, "available activated channel capacity" excludes channels used for broadcast retransmission or pay programming, but includes channels used by the operator for "origination services"—which the rules permit but no longer require the operator to provide. Consider, for example, a cable system that does not provide converters to its subscribers (who can therefore receive only 12 cable channels on their sets) and that uses 11 channels for broadcast retransmission and pay programming. If there is access demand for the twelfth channel, and if the operator has been using or desires to use that channel for its own origination (or "cablecasting") services, the rules and the *1976* Order indicate that access users be given priority for the twelfth channel and that the operator, to provide an additional origination channel to his subscribers, would have to install converters to activate a thirteenth channel, rather than relegate the access users to that course. On the other hand, the *1976 Order* indicates that the Commission has not finally decided how that kind of conflict should be resolved in particular cases, since it stated (App. 143 n.19): "It is not our intention that established cablecast services provided by system operators be automatically displaced. While we generally believe that automated services such as time and weather channels should give way to access uses, if other irreconcilable conflicts between channel uses develop, we are prepared to consider each such situation individually on its merits."

The rules also provide that, with the exception of systems in operation on June 21, 1976, with insufficient activated channel capability, "[e]ach * * * system [with 3500 or more subscribers] shall, in any case, maintain at least one full channel for shared access programming." 47 C.F.R. 76.254(c); App. 171. Consider a system without converters that commenced operations after June 21, 1976, and in time became capable of delivering 12 channels of broadcast retransmission to its subscribers. The *1976 Order* again suggests that in such a

to use channels that the operator is not using for broadcast retransmission or pay cable services. To that extent they can be viewed as a limited form of common carriage-type obligation.[34] See App. 104. But while that obligation admittedly may require a cable operator to transmit communications on its facilities that it might prefer not to, it is quite different from the obligation imposed by the right of reply statute

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case the system would have to reserve the twelfth channel exclusively for shared access rather than use it for broadcast retransmission (App. 144-145, 195). However, Section 76.254 (c) does not expressly provide that the full channel to be reserved must be one of those 12 channels that is actually available to subscribers without converters, rather than one of the 20 channels that are capable of being provided with converters.

The *1976 Order* did not specifically address the foregoing questions or other potential conflicts; rather it reserved such questions for further consideration (App. 148, 198). Until the Commission considers and resolves such particular conflicts in the context of specific cases, there is no need to speculate whether any particular resolution might present constitutional questions. But even if this Court were to conclude that certain of these provisions require a particular resolution of a hypothetical conflict that would infringe the cable operator's First Amendment rights, that conclusion would not affect the validity of the basic provisions of the rules, which present no such conflict and which, as noted, do not impair the cable operators' abilities to provide their traditional and principal services. Cf. *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932).

[34] The obligation is limited because it preserves the operator's basic freedom to engage in the business of transmitting signals of his choice and does not subject him to common carriage regulations under Title II of the Act, which would include tariff filing, rate regulation, and full dedication of facilities to common carriage.

that this Court invalidated in *Miami Herald Publishing Co.* v. *Tornillo*, *supra*.

Miami Herald involved a statute designed to foster a "responsible press" (418 U.S. at 256) by requiring newspapers to publish replies to their editorial attacks. This Court concluded that the statute would not only force newspapers to publish something they disagreed with but also would discourage newspapers from taking controversial stands on public issues with the result that "political and electoral coverage would be blunted or reduced." 418 U.S. at 257. In contrast, the access obligations at issue here are entirely unrelated to the content of what the cable operator otherwise transmits. The regulations in this case, as in *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, are "not content-related" (slip op. 24).

Finally, it is significant that the access rules do not present a question of subordinating First Amendment interests to other, unrelated, governmental interests. Rather, to the extent they can be regarded as affecting the First Amendment interests of cable operators, they present a question of competing First Amendment interests. That is so because the rules are designed to enhance what this Court has recognized many times to be important First Amendment interests, by providing significant additional outlets for expression of diverse views by individuals and groups within communities served by cable television.

In *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945), in upholding the application of the antitrust laws to the news media, this Court stated:

> [The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. * * * Freedom to publish means freedom for all and not for some.

Similarly, in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964), the Court reaffirmed our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."

In *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969), the Court upheld the Commission's personal attack rule and fairness doctrine as applied to broadcasters, stating: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." And in the context of those rules the Court stated, "[i]t is the right of the viewers and listeners, not the right of broadcasters, which is paramount" (*ibid.*). See also *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, upholding rules prospectively banning co-located newspaper-broadcaster combinations: "[T]he purpose and effect [of the rules] is to promote free speech, not to restrict it" (slip op. 24).

Finally, in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973), although rejecting claims that the First Amendment compelled the Commission to permit access to broadcast facilities for paid advertisements concerning controversial public issues, the Court acknowledged the First Amendment values in diversity of expression and increased programming (*id.* at 101-102, 110-114, 122), and stated (*id.* at 131):

> Conceivably at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable. Indeed, the Commission noted in these proceedings that the advent of cable television will afford increased opportunities for the discussion of public issues. In its proposed rules on cable television the Commission has provided that cable systems in major television markets
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> > "shall maintain at least one specially designated, noncommercial public access channel available on a first-come, nondiscriminatory basis. The system shall maintain and have available for public use at least the minimal equipment and facilities necessary for the production of programming for such a channel." 37 Fed. Reg. 3289, § 76.251(a)(4).

We recognize that the Court in *Columbia Broadcasting System* did not rule on the validity of the access rules that it mentioned. We also recognize that the Court in *Miami Herald* was presented with a claim that the Florida right of reply statute was

designed to enhance First Amendment interests in diversity of expression and held that those interests could not justify the restriction there at issue on the First Amendment rights of affected newspapers. But the Court in both cases acknowledged the competing First Amendment interests involved, and both cases support, rather than undermine, our contention that the important First Amendment interests that the access rules are designed to promote constitute a significant factor in determining their constitutionality. We submit that a proper consideration of those interests, of the relatively limited burdens imposed on cable operators, and of the particular and distinguishing features of cable television (discussed in the following section) shows that the access rules are "both practicable and desirable" (*Columbia Broadcasting System, supra*, 412 U.S. at 131) and consistent with the First Amendment.

2. *The Access Rules are Consistent With the First Amendment In View of the Particular Characteristics of Cable Television*

We have argued in the preceding section that the court of appeals erred in analogizing the access rules to the statute invalidated in *Miami Herald*. We also contend, in this section, that the court erred in equating cable television with newspapers, and also erred in concluding that the rules are invalid because cable television is not subject to the physical limitations of the broadcast spectrum. While the cable television industry has similarities to a number of

other industries—broadcasters, common carriers, public utilities, and newspapers—it also has features that distinguish it from each of those others. And the constitutionality of rules applied to that industry depends, *inter alia*, on an analysis of those similarities and differences. As this Court stated in *FCC* v. *Pacifica Foundation*, No. 77-528 (July 3, 1978), slip op. 19: "We have long recognized that each medium of expression presents special First Amendment problems."

We may assume *arguendo* that even the limited form of common carriage-type obligations imposed by the access rules could not be imposed on newspapers.[35] But it has never been doubted that the government can impose common carriage obligations on telephone and telegraph carriers and can require them to carry messages that they might prefer not to. And this Court in *Red Lion Broadcasting*, *supra*, upheld the constitutionality of a limited access obligation imposed on broadcasters (*i.e.*, access to reply to personal attacks) that a state could not, under *Miami Herald*, impose on newspapers. For purposes of constitutional analysis, there are important similarities between cable television and broadcasters and communications

[35] On the other hand, it could reasonably be argued that a state could, for example, require a newspaper to offer its classified advertising services to the public on a nondiscriminatory basis. Cf. *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973). Moreover, this Court has expressly held that a newspaper "may not accept or deny advertisements" in furtherance of an attempt to monopolize or restrain trade in violation of the antitrust laws. *Lorain Journal* v. *United States*, 342 U.S. 143, 156 (1951).

common carriers, as well as important differences between cable television and newspapers or other print media.

First, as we have noted, the four dissenting Justices in *Midwest Video I* stressed that "CATV is simply a carrier having no more control over the message content than does a telephone company" (406 U.S. at 680). While some cablecasters today originate or select some of their programming, the retransmission of broadcast signals or the transmission of programs designed for broadcast elsewhere is still the pervasive characteristic of the industry. Indeed, the access rules apply only to cable systems that retransmit broadcast signals (see 47 C.F.R. 76.5(a)).

Second, these broadcast-related activities support an expensive system of distribution having the characteristics of a natural monopoly. In significant respects a cable system is similar to a public utility; its operations require the placement of wires over or under the public streets involving substantial capital investment similar to that of other natural monopolies.[36] In contrast to the possibilities that exist in the

[36] Accordingly, most localities require a cable system to obtain a local government franchise before it can commence operations—an obligation that it is doubtful that a state could impose on a newspaper or magazine. See *Pacifica Foundation*, *supra*, slip op. 19-20. See generally Barnett, *State, Federal, and Local Regulation of Cable Television*, 47 Notre Dame L. Rev. 685 (1972). Indeed, the proposition endorsed by the court below that cable systems are not distinguishable from newspapers for First Amendment purposes would raise serious doubts as to the constitutionality of such local franchising regulations.

print media for such devices as direct mailings or dissemination of pamphlets or handbills, there is no practical way to engage in limited or ad hoc cablecasting without access to the system.[37]

Third, cable television has close and obvious similarities to television broadcasting, on which its business for the most part depends. It is true that cable television is not subject to the physical spectrum limitations on which this Court relied in *Red Lion Broadcasting Co.* v. *FCC*, *supra*, in upholding the application of the Commission's fairness doctrine and personal attack rules to broadcast licensees. See also *FCC* v. *National Citizens Committee for Broadcasting*, *supra*, slip op. 22. However, this Court recently ob-

[37] The proposition that the differences between cable television and newspapers are of constitutional significance is implicit in *Southwestern Cable* and *Midwest Video I*, both of which upheld the Commission's authority to prescribe rules for cable television that government could not, under *Miami Herald*, prescribe for newspapers. See also discussion, pages 48-49, *infra*. Indeed, the Court's opinion and a concurring opinion in *Miami Herald* strongly suggest the Court's recognition of the special and distinguishing features of the print media. The Court's opinion focuses almost exclusively on newspapers and the print media, and Mr. Justice White, concurring, stated that "the First Amendment erects a virtually insurmountable barrier between government and the *print* media * * *" (418 U.S. at 259; emphasis added). This Court has also recognized in several other cases that the electronic media present "special" problems which may warrant a different regulatory approach. See, *e.g.*, *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748, 773 (1976); *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 384 (1977); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 791 n.30 (1978).

served in *FCC* v. *Pacifica Foundation*, *supra*, slip op. 20, that "[t]he reasons for * * * [First Amendment] distinctions [between the broadcast and print media] are complex," rather than related solely to the physical limitations of the broadcast spectrum. From the standpoint of viewers and listeners, the similarities between cablecasting and broadcasting as media of expression all but eclipse the differences. And, for First Amendment purposes, "[i]t is the right of the viewers and listeners, not the right of the broadcasters [or cablecasters], which is paramount." *Red Lion*, *supra*, 395 U.S. at 390.

Furthermore, the physical constraints facing would-be cablecasters are in significant respects similar to the physical limitations of the broadcast spectrum. In *Red Lion*, the Court upheld the Commission's personal attack rules and fairness doctrine on the ground (395 U.S. at 388):

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.

The same considerations support the access rules at issue here. While a given cable system is not subject to the limitations of the radio spectrum, there are significant physical limitations, noted above (page 45, *supra*), that prevent most individuals who may wish to cablecast from constructing and operating their own cable television systems. Those constraints are not

merely the kind of economic constraints considered in *Miami Herald*, and indeed they are significantly greater than the constraints facing would-be broadcasters. The difficulties confronting would-be cablecasters are comparable to the difficulties that would face would-be telephone users who, in the absence of access to the facilities of a telephone company, would each have to construct his own telephone system to communicate by telephone. As in *Red Lion*, where one or two companies have acquired the privilege of constructing a large cable network in a community, "it is idle to posit an unabridgeable First Amendment right [to operate such a system] comparable to the right of every individual to speak, write, or publish" (395 U.S. at 388).

Finally, our submission that the access rules are consistent with the First Amendment derives significant support from *Southwestern Cable* and *Midwest Video I*. *Southwestern Cable* involved the Commission's signal carriage rules, which, *inter alia*, also imposed upon cable operators a limited form of carriage obligation—namely, the obligation to retransmit, upon request, the broadcast signals of broadcast licensees serving the same community as the cable system. Although this Court did not specifically address the First Amendment issues, it expressly noted in *Midwest Video I* that the courts of appeals had correctly upheld the signal carriage rules, citing *Black Hills Video Corp.* v. *FCC*, 399 F.2d 65 (8th Cir. 1968) (406 U.S. at 659 n.17);

and *Black Hills Video Corp.* expressly rejected First Amendment challenges to those rules. 399 F.2d at 69.[38] For First Amendment purposes, we see no material distinction between the limited carriage obligation involved in *Southwestern Cable* and *Black Hills* and the access rules involved here.

III

THE RULES UNDER REVIEW DO NOT CONSTITUTE A TAKING OF PROPERTY WITHOUT COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT

The court of appeals also erred in suggesting that the channel capacity, access, and equipment availability rules constituted a taking of property without just compensation in violation of the Fifth Amendment (App. 77-79).[39]

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[38] In *Black Hills*, the mandatory carriage rule, along with the Commission's distant signal and non-duplication rules for cable television, were specifically upheld against a First Amendment attack. The distant signal and/or non-duplication rules were also found constitutionally valid in *Conley Electronics Corp.* v. *FCC*, 394 F.2d 620, 624 (10th Cir.), cert. denied, 393 U.S. 858 (1968); *Titusville Cable TV, Inc.* v. *United States*, 404 F.2d 1187, 1189-1190 (3d Cir. 1968); and *Great Falls Community TV Cable Co.* v. *FCC*, 416 F. 2d 238, 240-242 (9th Cir. 1969).

[39] In addition, the court expressed the view that the rules "violate the due process provisions of the Constitution" (App. 77). The reasons for that conclusion are not clear, since there was no claim that any party's procedural rights were violated during the Commission's proceedings. The court appears to have relied on notions of substantive due process and its own manifest dislike of the rules, saying (App. 78 n.78): "Those relying on regulatory power and exuberance,

While it may be difficult in some cases to draw the line between permissible regulation and an unconstitutional taking, and the question is one of degree (see *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415-416 (1922)),[40] the rules at issue here do not present even a colorable taking claim. In *Penn Central Transportation Co.* v. *New York City*, No. 77-444 (June 26, 1978), this Court listed two factors that have particular significance in determining whether there has been a taking: first, "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investiment backed expectations"; and, second,

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to deliver over the facilities of another at no cost, may rue the day. The regulatory mind is normally unbiased; the regulatory rain falls on all." But the court's personal views on the merits of economic regulation is not a ground for finding a due process violation. As this Court stated in *Ferguson* v. *Skrupa*, 372 U.S. 726, 731-732 (1963) (citations omitted):

> We refuse to sit as a "superlegislature to weigh the wisdom of legislation," and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."

[40] There Mr. Justice Holmes stated for the Court: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * [T]his is a question of degree—and therefore cannot be disposed of by general propositions." See also *Goldblatt* v. *Hempstead*, 369 U.S. 590, 594 (1962) ("There is no set formula to determine where regulation ends and taking begins").

"the character of the governmental action * * * [*e.g.*, whether it] can be characterized as a physical invasion by Government" (slip op. 18). Here, the relatively limited obligations imposed by these rules do not significantly impair the operator's abilities to provide his own services or recover his investment. Moreover, this is not a situation where there has been a physical invasion by government. Compare, *e.g.*, *United States* v. *Causby*, 328 U.S. 256 (1946). Rather, it is a case where the "interference," such as it is, "arises from [a] public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, *supra*, slip op. 18. Accordingly, the rules involved here fall far short of a taking.[41]

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[41] Indeed, the due process and taking arguments accepted by the court of appeals are substantially the same arguments made by the cable operators in opposing the significantly more burdensome mandatory origination rule upheld by this Court in *Midwest Video I*. See Brief of Midwest Video Corp. in No. 71-506 at 32-38; *Midwest Video I*, *supra*, 406 U.S. at 658 n.15, 662-664. As previously noted (pages 7-8, *supra*), the Commission repealed the origination rule in favor of access obligations partly because it found the latter to be less burdensome to cable operators.

CONCLUSION

The judgment of the court of appeals should be reversed and the order of the Commission affirmed.

Respectfully submitted.

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